In re: JEANNE AND STEVE CHARTER.
BPRA Docket No. 98-0002.
Decision and Order filed September 22, 2000.

Beef Promotion Act – First amendment – Official notice – Willful – Preponderance of the evidence – Sanction – Civil penalty.

The Judicial Officer affirmed Judge Baker's (ALJ) decision that the Respondents violated the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) by failing to remit assessments to a brand inspector or a qualified state beef council for 250 cattle and by failing to pay late-payment charges for the assessments the Respondents failed to remit when due. The Judicial Officer rejected the Respondents' contention that *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), was controlling. The Judicial Officer found that the ALJ properly relied on *Goetz v. Glickman*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999), and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), and the Judicial Officer found that *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), was controlling. The Judicial Officer also found that the ALJ's denial of the Respondents' motion to take official notice of the unregulated nature of the beef market, the cattle industry, and the cattle market, was proper. The Judicial Officer found that the Respondents' disagreements with the administration of the beef promotion program and the activities of the National Cattlemen's Beef Association are not defenses to the Respondents' violations of 7 C.F.R. §§ 1260.172, .175, .311, and .312 and are not mitigating circumstances to be taken into account when considering the sanction to impose on the Respondents for their violations. The Judicial Officer rejected the Respondents' contention that the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board are a single entity and that the National Cattlemen's Beef Association is an agency of the federal government. The Judicial Officer found that the ALJ's assessment of a $12,000 civil penalty against the Respondents was warranted in law and justified in fact.

Sharlene A. Deskins, for Complainant.
Kelly J. Varnes, Billings, MT, for Respondents.
Initial decision issued by Dorothea A. Baker, Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this proceeding by filing a Complaint on August 5, 1998. Complainant instituted this proceeding under the Beef Promotion and Research Act of 1985 (7 U.S.C §§ 2901-2911) [hereinafter the Beef Promotion Act]; the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217) [hereinafter the Beef Promotion Order]; the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) [hereinafter the Beef Promotion Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that Jeanne Charter and Steve Charter [hereinafter Respondents]: (1) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R.

§§ 1260.172, .310, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997 (Compl. ¶ II); and (2) willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for three cattle sold on or about April 4, 1998 (Compl. ¶ III). Complainant requests the issuance of an order requiring Respondents to cease and desist from violating the Beef Promotion Order and the Beef Promotion Regulations and assessing civil penalties against Respondents in accordance with section 9 of the Beef Promotion Act (7 U.S.C. § 2908) (Compl. at 2-3).

On September 29, 1998, Respondents filed an Answer admitting that they did not pay assessments on the sale of cattle as alleged in the Complaint (Answer ¶¶ 3-4) and raising five affirmative defenses (Answer at 2-3).

On August 4, 1999, Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] presided over a hearing in Billings, Montana. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Kelly J. Varnes, Hendrickson, Everson, Noennig & Woodward, P.C., Billings, Montana, represented Respondents.

On October 22, 1999, Complainant filed Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof. On February 4, 2000, Respondents filed Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum in Support of Proposed Findings of Fact, Conclusions of Law and Order. On February 18, 2000, Complainant filed Complainant's Reply to Respondents' Proposed Findings of Fact and Conclusions of Law and Memorandum.

On April 26, 2000, the ALJ filed a Decision and Order [hereinafter Initial Decision and Order] in which the ALJ: (1) concluded Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to deduct and collect assessments and by failing to remit assessments to a brand inspector or a qualified state beef council for 250 cattle sold on October 9, 1997, and April 4, 1998; (2) concluded Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late-payment charges for assessments Respondents failed to remit to a qualified state beef council when due; (3) ordered Respondents to cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations; (4) assessed Respondents a $12,000 civil penalty; and (5) ordered Respondents to pay past-due assessments and late-payment charges of $417.79 to the Montana Beef Council (Initial Decision and Order at 3, 10-11).

On June 1, 2000, Respondents filed an Appeal Petition, a Brief in Support of Appeal Petition, and a Petition to Reopen Hearing. On July 7, 2000, Complainant

filed Opposition to Defendant's Motion to Reopen Hearing. On September 1, 2000, Complainant filed Opposition to the Appeal Petition of the Respondents.[1] On September 5, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for a decision and a ruling on Respondents' Petition to Reopen Hearing.[2]

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's discussion of sanctions, as restated.

Complainant's exhibits are designated by "CX," Respondents' exhibits are designated by "B" and "C," and transcript references are designated by "Tr."

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Findings of Fact and Conclusions of Law

1. Respondents own a 7,000-acre ranch located in Montana. The number of cattle Respondents have varies from 250 to 1,000. Respondents have been in the cattle business together for the past 25 years. Respondents operate using the business names "Country Marketing Services" and "Electronic Trading Company." (Answer ¶ 1; Tr. 168-70, 199-201.)

2. Respondents, at all times material to this proceeding, were "producers" of cattle as defined in the Beef Promotion Order (7 C.F.R. § 1260.116) (Answer ¶ 2) and therefore were required by the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations to pay assessments for cattle they sold.

3. On or about October 9, 1997, Respondents sold 247 cattle. Montana law requires when cattle are sold that a brand inspector examine the brands. A brand inspector examined the brands on cattle during the October 9, 1997, sale. In addition to examining the brand, the brand inspector is also responsible for collecting from producers the assessment due from the sale of cattle. This assessment is sometimes referred to as a "checkoff dollar." At the time of the sale

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[1]Complainant filed Opposition to the Appeal Petition of the Respondents 1 day late (See Informal Order dated August 2, 2000). Therefore, I have not considered Complainant's Opposition to the Appeal Petition of the Respondents, and Complainant's Opposition to the Appeal Petition of the Respondents forms no part of the record in this proceeding.

[2]I am filing a Ruling Denying Respondents' Petition to Reopen Hearing simultaneous with the filing of this Decision and Order. *In re Jeanne and Steve Charter*, 59 Agric. Dec. ___ (Sept. 22, 2000) (Ruling Denying Respondents' Pet. to Reopen Hearing).

of the 247 cattle, and thereafter, Respondents did not pay the assessments due. The Cattlemen's Beef Promotion and Research Board was informed of Respondents' failure to pay the assessments due. The matter was ultimately referred to the United States Department of Agriculture. (Answer ¶ 3; Tr. 12-17, 31, 61-63, 69; CX 1, CX 2.)

4. On or about April 4, 1998, Respondents sold three cattle. At the time of the sale of the three cattle, and thereafter, Respondents did not pay the assessments due. The Cattlemen's Beef Promotion and Research Board was informed of Respondents' failure to pay the assessments due. The matter was ultimately referred to the United States Department of Agriculture. (Answer ¶ 4; Tr. 17-19, 69; CX 3.)

5. Respondents willfully failed to pay assessments for 247 cattle sold on or about October 9, 1997.

6. Respondents willfully failed to pay assessments for three cattle sold on or about April 4, 1998.

7. Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998. Each of the 250 transactions constitutes a separate violation.

8. Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late-payment charges for assessments that Respondents failed to pay when due.

Discussion

The Beef Promotion Act authorizes the creation of a coordinated program of research and promotion, directed and funded by the cattle industry and with oversight authority by the Secretary of Agriculture. The Beef Promotion Act directs the Secretary of Agriculture to promulgate a Beef Promotion Order establishing the self-help program and providing for financing through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States (7 U.S.C. §§ 2903, 2904). The Beef Promotion Act establishes the assessment at the rate of $1 per head on cattle sales to be collected from producers and importers (7 U.S.C. § 2904(8)).

As directed by the Beef Promotion Act, the Secretary of Agriculture promulgated, after notice and comment, a Beef Promotion Order. The Beef Promotion Order became effective July 18, 1986 (51 Fed. Reg. 26,138 (1986)). As required by section 7(a) of the Beef Promotion Act (7 U.S.C. § 2906(a)), on May

10, 1988, the Secretary of Agriculture conducted a referendum among eligible cattle producers and cattle and beef importers for the purpose of determining whether the Beef Promotion Order should be continued (53 Fed. Reg. 509-14 (1988)). A majority of persons voting in the referendum approved the Beef Promotion Order, which remains in force today. The Beef Promotion Act provides, however, that after the initial referendum, the Secretary of Agriculture may conduct additional referenda upon the request of 10 per centum or more of cattle producers to determine whether the cattle producers favor the termination or suspension of the Beef Promotion Order. 7 U.S.C. § 2906(b).

The Beef Promotion Order establishes the Cattlemen's Beef Promotion and Research Board, composed of cattle producers and importers appointed by the Secretary of Agriculture, and the Beef Promotion Operating Committee, composed of 10 members of the Cattlemen's Beef Promotion and Research Board and 10 members elected by a federation that includes qualified state beef councils, such as the Montana Beef Council. 7 U.S.C. §§ 2903(a)-(b), 2904(1), (4)(A); 7 C.F.R. §§ 1260.141, .161.

The Cattlemen's Beef Promotion and Research Board acts primarily through the Beef Promotion Operating Committee, which develops and implements promotion, research, consumer information, and industry information plans or projects, subject to the Secretary of Agriculture's approval. 7 U.S.C. § 2904(4)(B); 7 C.F.R. § 1260.168(d), (e). These activities are funded by a $1-per-head assessment on cattle sold in or imported into the United States. Each person making payment to a cattle producer for cattle must collect the assessments and remit the money directly to the Cattlemen's Beef Promotion and Research Board or to a qualified state beef council, which, in turn, remits the money to the Cattlemen's Beef Promotion and Research Board. 7 U.S.C. § 2904(8)(A)-(C); 7 C.F.R. §§ 1260.172(a)(1), .310, .311(a), and .312(c). The Beef Promotion Order requires that the Beef Promotion Operating Committee implement programs of promotion, research, consumer information, and industry information by contracting with established national nonprofit, industry-governed organizations. 7 C.F.R. § 1260.168(b). The Beef Promotion Act prohibits the use of the assessments collected by the Cattlemen's Beef Promotion and Research Board "for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the order." 7 U.S.C. § 2904(10). Similarly, the Beef Promotion Order prohibits the use of funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action, with the exception of recommending amendments to 7 C.F.R. pt. 1260. 7 C.F.R. § 1260.169(e). (See also 7 C.F.R. § 1260.181(b)(7) which provides that, in order to be certified by the Cattlemen's Beef Promotion and Research Board as a qualified state beef council, the state beef council must not use state beef council funds collected pursuant to the Beef Promotion Order for the purpose of influencing governmental policy or action.)

The Beef Promotion Act authorizes the Secretary of Agriculture to investigate violations of the Beef Promotion Act, to issue orders restraining or preventing persons from violating the Beef Promotion Order, and to assess civil penalties of not more than $5,000 per violation of the Beef Promotion Order. 7 U.S.C. §§ 2908(a), 2909.

Respondents acknowledge they violated the Beef Promotion Order and the Beef Promotion Regulations but seek to justify their failures to pay assessments on various allegations of infirmities as to the Beef Promotion Act and the Beef Promotion Order.

Neither the Beef Promotion Act nor the Beef Promotion Order exempts Respondents from paying assessments because of their opposition to one of the industry organizations with which the Beef Promotion Operating Committee contracts for services. Nor do Respondents' other arguments relating to their failures to pay assessments furnish justification for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Respondents' disagreements and contentions with respect to the administration of the Beef Promotion Order are not topics properly before this forum. The purposes of this administrative proceeding are to determine whether Respondents paid amounts properly assessed and, if not, to determine the appropriate sanctions. This forum is not the proper forum in which to adjudicate the validity of Respondents' position with respect to the National Cattlemen's Beef Association. Specifically, Respondents argue that the Agricultural Marketing Service should not have recognized the National Cattlemen's Beef Association as an established national nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113.

The National Cattlemen's Beef Association is the successor organization to the National Live Stock and Meat Board and has existed under various names since 1898 (C-1, C-5; Tr. 73, 96). The National Cattlemen's Beef Association is a nonprofit organization "governed by a [b]oard of [d]irectors representing the cattle or beef industry on a national basis" (Tr. 96). The National Cattlemen's Beef Association describes itself as follows:

> Initiated in 1898, NCBA is the marketing organization and trade association for America's one million cattle ranchers and farmers. With offices in Denver, Chicago and Washington D.C., NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry.

C-8 at 2.

The Agricultural Marketing Service recognized the National Cattlemen's Beef

Association as an established national nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113 (B-4). An agency's interpretation of its own regulations should be accorded substantial deference. *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1349-50 (6th Cir. 1994), *cert. denied*, 516 U.S. 806 (1995). The record supports the Agricultural Marketing Service determination that the National Cattlemen's Beef Association is an established national nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113.

Respondents also contend the Cattlemen's Beef Promotion and Research Board is lobbying by contracting with the National Cattlemen's Beef Association to administer projects that promote beef. The Beef Promotion Order states that no funds collected by the Cattlemen's Beef Promotion and Research Board shall in any manner be used for the purpose of influencing governmental policy or action, except to recommend to the Secretary of Agriculture amendments to 7 C.F.R. pt. 1260. 7 C.F.R. § 1260.169(e).

Respondents failed to present any evidence other than their own unsubstantiated assertions to support their claim that checkoff dollars were used for the purpose of influencing governmental policy or action. The Beef Promotion Order includes section 1260.168(b) which requires the Beef Promotion Operating Committee to contract with established national nonprofit, industry-governed organizations. The Beef Promotion Operating Committee's contracts and relationships with industry organizations are authorized by the Beef Promotion Order and are an effective way to promote beef.

Respondents' contentions, which are found to be without merit, relate to the Montana Beef Council's rejection of Respondents' proposal for a nutritional speaker and the Montana Beef Council's denial of Respondents' application for funds to be used to pay for a speaker to talk about the nutritional value of beef. These contentions are not defenses to Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Respondents' contention that they are not required to pay assessments because the Beef Promotion Act is unconstitutional is without merit. Both the United States Court of Appeals for the Third Circuit and the United States Court of Appeals for the Tenth Circuit have upheld the constitutionality of assessments under the Beef Promotion Act. *Goetz v. Glickman,* 149 F.3d 1131 (10th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999); *United States v. Frame,* 885 F.2d 1119 (3d Cir. 1989).

Respondents' violations were willful and significant. A violation is willful if the violator: (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice; or (2) acts with careless disregard of statutory requirements.[3]

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[3] *See, e.g., Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 120 S.Ct. 530 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925

Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998.

Respondents willfully violated section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) by failing to pay late-payment charges on assessments that Respondents failed to pay when due.

The Beef Promotion Act provides for sanctions for those who violate the terms of the Beef Promotion Order. The Beef Promotion Act provides, if the Secretary of Agriculture believes that the administration and enforcement of the Beef Promotion Act or an order will be adequately served by such procedure, following an opportunity for an administrative hearing on the record, the Secretary of Agriculture may: (1) issue an order to restrain or prevent a person from violating an order; and (2) assess a civil penalty of not more than $5,000 for violation of such order. 7 U.S.C. § 2908(a).

F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Appeal in this proceeding does not lie to either the United States Court of Appeals for the Fourth Circuit or to the United States Court of Appeals for the Tenth Circuit. However, even under this more stringent definition, Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations would still be found willful.

Sanctions

The Judicial Officer has set forth criteria that are appropriate to consider in determining a civil penalty. The Judicial Officer stated that in determining the amount of the civil penalty to be assessed under section 9(a) of the Beef Promotion Act (7 U.S.C. § 2908(a)), it is appropriate to consider the nature of the respondent's violations, the number of the respondent's violations, the damage or potential damage to the regulatory program from the respondent's violations, prior warnings or other instructions given to the respondent, and any other circumstances shedding light on the degree of the respondent's culpability. *In re Jerry Goetz*, 56 Agric. Dec. 1470, 1524 (1997), *aff'd*, 99 F. Supp.2d. 1308 (D. Kan. 2000), *appeal docketed*, No. 00-3173 (10th Cir. June 14, 2000).

Respondents engaged in an effort to undermine or to otherwise challenge provisions of the Beef Promotion Order and the Beef Promotion Regulations by obtaining a public forum to air grievances for which no remedy could be offered in an administrative proceeding. If Respondents are assessed less than a substantial civil penalty, the sanction would not be meaningful and would serve to encourage Respondents and others to fail to pay assessments at some future date.

Respondents' own admissions establish that they failed to pay assessments as required by the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations and also that their violations of the Beef Promotion Order and the Beef Promotion Regulations were willful. Respondents were aware of the requirements of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations for paying assessments and decided not to comply with those requirements as a means of getting publicity for their positions. Although the amount of assessments which was withheld was relatively small, the impact of Respondents' failures to pay the assessments has the potential to adversely impact the Beef Promotion Order and to encourage other people to withhold assessments so that they can seek redress of alleged grievances in an administrative proceeding. Respondents' conduct is more than sufficient reason to justify the assessment of a $12,000 civil penalty, which is the sanction recommended by Complainant.

The Beef Promotion Order provides that a late-payment charge must be assessed when assessments are not paid timely. 7 C.F.R. § 1260.175. As of December 31, 1999, Respondents owed the Cattlemen's Beef Promotion and Research Board $417.79 for past-due assessments and late-payment charges.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents raise nine issues in their Appeal Petition. First, Respondents contend the ALJ erred by failing to consider *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), and by relying on *Goetz v. Glickman,* 149 F.3d 1131 (10th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999), and *United States v. Frame,*

885 F.2d 1119 (3d Cir. 1989) (Appeal Pet. at 1-2). I disagree with Respondents' contention that the ALJ erroneously failed to consider *United Foods* and erroneously relied on *Goetz* and *Frame*.

The issue addressed in *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), is the constitutionality of provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the Mushroom Promotion Act], a statute which is not at issue in this proceeding. In *United Foods*, the Sixth Circuit held that provisions of the Mushroom Promotion Act that compel mushroom producers and mushroom importers to contribute funds used to advertise mushrooms, violate the First Amendment to the United States Constitution.

The ALJ properly relied on *Goetz* and *Frame*, both of which address the constitutionality of provisions of the Beef Promotion Act which compel cattle producers to contribute funds used to promote beef and beef products. In *Goetz* and *Frame*, the United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the Third Circuit, respectively, upheld the constitutionality of compelled assessments under the Beef Promotion Act and the use of those assessments for beef promotion and research. I find the ALJ's reliance on cases concerning the constitutionality of the Beef Promotion Act proper and the ALJ did not err by failing to discuss *United Foods*, which concerns the constitutionality of the Mushroom Promotion Act.

Respondents argue *United Foods* should be followed in this proceeding because the beef industry, like the mushroom industry, is largely unregulated and *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), is inapposite (Brief in Support of Appeal Pet. at 3-4). I disagree with Respondents' contentions that *United Foods* should be followed in this proceeding and that *Wileman* is inapposite.

The Supreme Court of the United States held in *Wileman* that compelled assessments used to fund generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the Agricultural Marketing Agreement Act of 1937, as amended, neither abridge First Amendment rights nor implicate the First Amendment. The Sixth Circuit distinguished *Wileman* from *United Foods* on the ground that the California tree fruit business is extensively regulated, but that the mushroom business at issue in *United Foods* is unregulated, except for the enforcement of a regional mushroom advertising program. In *United Foods*, the Sixth Circuit interprets *Wileman* as holding that compelled commercial speech is permitted under the First Amendment to the United States Constitution if: (1) the compelled commercial speech is germane to a valid, comprehensive, regulatory scheme; and (2) the compelled commercial speech is nonideological, nonsymbolic, and nonpolitical in nature, as follows:

> We do not read the majority opinion in *Wileman* as saying that any compelled commercial speech that is nonpolitical or nonsymbolic or nonideological does not warrant First Amendment protection. We conclude that the explanation for the *Wileman* decision is found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of the free market, as well as in the nonpolitical nature of the compelled speech. The majority uses this concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" germaneness "and" nonpolitical–is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing–either the collectivization of the industry or the purely commercial nature of the advertising–the First Amendment invalidates the compelled commercial speech, absent some other compelling justification not present in the case before us. The Court's holding in *Wileman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise.

United Foods, Inc. v. United States, 197 F.3d at 224.

I respectfully disagree with the Sixth Circuit's interpretation of *Wileman*. I read *Wileman* as holding that compelled assessments used to fund California tree fruit advertising is not a *restriction* on commercial advertising because producers are not prohibited or restrained from promoting or advertising their products or communicating any other message to any audience and that compelled funding of advertising of tree fruit passes constitutional muster "because (1) the generic advertising of California peaches and nectarines is unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments are not used to fund ideological activities." *Wileman*, 521 U.S. at 473.

The United States District Court for the Eastern District of California rejected the contention that *Wileman* does not apply to the California table grape industry and the California cut flower industry because those industries are not heavily regulated. In *Delano Farms Co. v. California Table Grape Comm'n*, the district court held:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech. . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman Bros.*] indicates results should differ in "stand alone" advertising programs.

Delano Farms Co. v. California Table Grape Comm'n, CV-F-96-6053 OWW DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997) (App. A).

In *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, the district court, as stated during the hearing, held:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

Matsui Nursery, Inc. v. California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997) (Reporter's Transcript) (App. B).

Moreover, in *Goetz*, the United States Court of Appeals for the Tenth Circuit rejected a cattle producer's contention that compelled assessments under the Beef Promotion Act, used to fund the promotion of beef and beef products, violated his First Amendment rights and found *Wileman* applicable, as follows:

First Amendment

> Goetz also asserts the assessment violates his First Amendment right because he is compelled to support advertising which promotes beef consumption. Goetz argues the Act singles out and unfairly burdens producers, importers and persons who must collect the tax (buyers of beef).
>
> The Secretary responds that the Act does not suppress or restrict Goetz' speech, it merely requires he pay an assessment to fund the promotion of a commodity that he markets and is no different than compelled funding of unions or integrated bars. Furthermore, the Secretary and intervener argue the Act is "government speech" (as opposed to commercial speech) and there are no First Amendment restrictions on "government speech."
>
> This Court agrees with the Secretary and intervener. *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ___, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997), involved a First Amendment challenge to a generic advertising

program for California peaches, nectarines, and plums which was established pursuant to a marketing order promulgated by the Secretary of Agriculture and supported by mandatory assessments imposed on the handlers of fruit. The Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit in *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (1995), which held the peach promotion program violated the First Amendment, and the Third Circuit in *Frame*, which held the Beef Promotion Act did not violate the First Amendment.

In *Wileman Bros.* the Supreme Court held that the generic marketing program did not raise a First Amendment issue for the Court because the marketing order did not impose restraint on the freedom of any producer to communicate any message to any audience, did not compel any person to engage in any actual or symbolic speech, and did not compel the producers to endorse or to finance any political or ideological views. *See id.* at 2138. The Supreme Court found its compelled speech cases inapplicable because there is no "compelled speech." The Court held the assessments for ads did not require the fruit producers to repeat objectionable messages, use their property to convey antagonistic ideological messages, force them to respond to a hostile message when they prefer to remain silent or require them to be publicly identified or associated with another's message. *See id.* at 2139. Furthermore, the Court said, the assessments are financial contributions for generic advertising that program participants do not disagree with, and the advertising is not attributed to individual handlers. *See id.* In addition, none of the generic ads promote any particular message other than encouraging consumers to buy California tree fruit. *See id.*

The Court concluded that the generic ads for California fruit are germane to the purposes of the marketing orders and the assessment is not used for ideological activities. *See id.* at 2140. The Court further concluded that generic advertising is a species of economic regulation that should enjoy the same strong presumption of validity that the Court accords other policy judgments made by Congress. *See id.* at 2141. Finding the generic advertisements do not warrant special First Amendment scrutiny under the *Central Hudson* standard, the Supreme Court reversed the Ninth Circuit decision. *See id.* at 2142.

In the case at bar, the district court incorrectly concluded that the Act was commercial speech and applied *Central Hudson*. The district court found the Act passed the *Central Hudson* test and did not violate Goetz' freedom of speech and association. *Goetz v. Glickman*, 920 F. Supp. at 1182-83. We find the district court erred in applying the *Central Hudson*

> test to Goetz' First Amendment claim. However, we can affirm the district court on a basis not relied on by the court if supported by record and law. *United States v. Corral*, 970 F.2d 719, 726 n.5 (10th Cir. 1992). Therefore, we affirm the district court and find under the Supreme Court's decision in *Wileman Bros.*, Goetz' First Amendment claim is fruitless.

Goetz v. Glickman, 149 F.3d at 1138-39 (footnote omitted).

Therefore, I do not find *United Foods* applicable to this proceeding, as Respondents contend, and I find *Wileman* controlling.

Second, Respondents contend the ALJ's denial of Respondents' Motion to Take Official Notice is error (Appeal Pet. at 2). I disagree with Respondents' contention that the ALJ's denial of Respondents' Motion to Take Official Notice is error.

Official notice is authorized by the Administrative Procedure Act and the Rules of Practice. The Administrative Procedure Act provides, as follows:

> **§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**
>
> . . . .
>
> (e) . . . When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show to the contrary.

5 U.S.C. § 556(e).

Section 1.141(h)(6) of the Rules of Practice identifies the circumstances under which an administrative law judge shall take official notice, as follows:

> **§ 1.141 Procedure for hearing.**
>
> . . . .
>
> (h) *Evidence*. . . .
>
> . . . .
>
> (6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

7 C.F.R. § 1.141(h)(6).

Respondents filed a Motion to Take Official Notice on January 10, 2000, requesting that the ALJ take official notice of the unregulated nature of the beef market, the cattle industry, and the cattle market. Respondents attached to their Motion to Take Official Notice United States Department of Agriculture, Economic Research Service, Technical Bulletin No. 1874 (April 1999).

On January 31, 2000, Complainant filed Opposition to Defendant's Motion to Take Official Notice stating: (1) official notice is limited to fact of established character and the state of the regulation of the beef industry cannot be characterized as being a fact of established character; (2) United States Department of Agriculture, Economic Research Service, Technical Bulletin No. 1874 (April 1999), does not establish the state of the regulation of the beef industry; and (3) the state of the regulation of the beef industry is irrelevant to the proceeding.

On February 2, 2000, the ALJ denied Respondents' Motion to Take Official Notice, as follows:

> The Respondents seek official notice of the unregulated natures of the cattle industry and particularly the cattle market. Even if Bulletin 1874 tended to establish the facts as claimed by Respondents [which it does not] such circumstances would not be sufficient to relieve the Respondents from paying proper due assessments made pursuant to the provisions of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911) and the Beef Promotion and Research Order, 7 C.F.R. §§ 1260.101-.217.
>
> For these reasons as well as those enunciated by Complainant in its opposition to the requested official notice and based upon the record herein, the Respondents' Motion to the Official Notice, filed January 10, 2000, is denied.

Denial of Motion to Take Official Notice.

I agree with the ALJ. The state of the regulation of the beef market, the cattle industry, and the cattle market is not a fact of established character. Moreover, the state of the regulation of the beef market, the cattle industry, and the cattle market is not relevant to this proceeding. Respondents' Motion to Take Official Notice of the unregulated nature of the beef market, the cattle industry, and the cattle market is related to Respondents' contention that *United Foods, Inc. v. United States*, 197 F.3d 221 (6th Cir. 1999), is applicable to this proceeding (Memorandum in Support of Motion to Take Official Notice). However, for the reasons discussed in this Decision and Order, *supra*, I find *United Foods* is not applicable to this proceeding.

Third, Respondents contend the ALJ erroneously held that the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, is constitutional because it does not limit their freedom of speech (Appeal Pet. at 3). Respondents

argue the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, are unconstitutional because the Beef Promotion Act and the Beef Promotion Order force Respondents to subsidize advertising with which they disagree and because the entity receiving most of the advertising funds, the National Cattlemen's Beef Association, engages in activities with which Respondents disagree (Brief in Support of Appeal Pet. at 8-9).

The Supreme Court of the United States held the First Amendment does not bar all mandatory assessments used to fund speech with which members of the group required to pay the assessments object. *Wileman*, 521 U.S. at 472. In *Goetz* and *Frame*, the United States Court of Appeals for the Tenth Circuit and the United States Court of Appeals for the Third Circuit, respectively, upheld the constitutionality of mandatory assessments under the Beef Promotion Act and the use of those assessments to fund beef promotion with which cattle producers required to pay the assessments disagreed. Respondents' objections to the use of assessments to fund beef promotion are not materially different from the objections raised by the cattle producers in *Goetz* and *Frame*.

Moreover, Respondents' disagreements with the National Cattlemen's Beef Association, one of the entities with which the Beef Promotion Operating Committee contracts to administer projects to promote beef, do not provide meritorious bases for Respondents' argument that the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, are unconstitutional.

Specifically, Respondents contend the National Cattlemen's Beef Association misrepresents itself as representing Respondents (Brief in Support of Appeal Pet. at 8-9).

The record does not support a finding that the National Cattlemen's Beef Association specifically identifies Respondents as individuals who the National Cattlemen's Beef Association represents. Moreover, the record does not support a finding that the National Cattlemen's Beef Association specifically identifies Respondents as agreeing with its positions.

However, the National Cattlemen's Beef Association does state that it is the marketing organization and trade association for America's one million cattle farmers and ranchers (C-4, C-5, C-6, C-7, C-8, C-9). Respondents are cattle ranchers located in the United States (Finding of Fact No. 1). Respondents could infer the National Cattlemen's Beef Association takes the position that there are one million cattle farmers and ranchers in the United States and that, since Respondents are United States cattle ranchers, the National Cattlemen's Beef Association is Respondents' marketing organization and trade association. However, even if I found that the National Cattlemen's Beef Association represents itself to be Respondents' marketing organization and trade association, that finding would not cause me to conclude that the Beef Promotion Act and the Beef Promotion Order,

as applied to Respondents, are unconstitutional. Moreover, the National Cattlemen's Beef Association's purported misrepresentation is neither a defense to Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations nor a mitigating circumstance to be taken into consideration with respect to the sanction to be imposed for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Respondents also contend the National Cattlemen's Beef Association uses funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) (Brief in Support of Appeal Pet. at 8-9).

The record does not support a finding that the National Cattlemen's Beef Association used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e). Instead, the record supports a finding that the National Cattlemen's Beef Association has not used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) (Tr. 77-79). Moreover, even if I found that the National Cattlemen's Beef Association used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e), that finding would not cause me to conclude that the Beef Promotion Act and the Beef Promotion Order, as applied to Respondents, are unconstitutional. Further still, the National Cattlemen's Beef Association's purported use of funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) is neither a defense to Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations nor a mitigating circumstance to be taken into consideration with respect to the sanction to be imposed for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Fourth, Respondents contend the ALJ's conclusion that the defenses raised by Respondents are not topics properly before this forum is error (Appeal Pet. at 3-4). Specifically, Respondents contend the ALJ should have addressed the activities of the National Cattlemen's Beef Association (Brief in Support of Appeal Pet. at 9-11).

The ALJ did conclude that a number of Respondents' contentions were not properly before her, as follows:

> The Respondents' disagreements and contentions with respect to the administration of the Order are not topics properly before this forum. This is an administrative proceeding to determine whether amounts properly assessed were paid and, if not, a determination of sanctions that are

> appropriate. This is not a proper forum to adjudicate the validity of the Respondents' position with respect to the National Cattlemen's Beef Association (NBA).

Initial Decision and Order at 5.

Despite this conclusion, the ALJ considered and rejected a number of Respondents' contentions regarding the activities of the National Cattlemen's Beef Association (Initial Decision and Order at 6-7).

The Complaint alleges that Respondents willfully violated section 1260.172 of the Beef Promotion Order and sections 1260.310 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .310, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998 (Compl. ¶¶ II, III). The activities of the National Cattlemen's Beef Association are not relevant to the violations alleged in the Complaint or to the sanction to be imposed on Respondents for violations of the Beef Promotion Order and the Beef Promotion Regulations. The ALJ's conclusion that this forum is not the proper forum in which to address the activities of the National Cattlemen's Beef Association is not error.

Fifth, Respondents contend the ALJ erroneously determined that the National Cattlemen's Beef Association is not regulated by the Beef Promotion Order and thus not subject to the defenses raised by Respondents (Appeal Pet. at 4).

Respondents' contention that the National Cattlemen's Beef Association is regulated under the Beef Promotion Order is not relevant to this proceeding. Even if I found that the National Cattlemen's Beef Association is regulated under the Beef Promotion Order, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations.

Respondents also contend the National Cattlemen's Beef Association is so closely tied to the Cattlemen's Beef Promotion and Research Board that no reasonable separation can be made between the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board and the National Cattlemen's Beef Association is, in effect, a governmental agency (Appeal Pet. at 4; Brief in Support of Appeal Pet. at 10-11).

The record establishes that the National Cattlemen's Beef Association is a private industry organization and that the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board are separate entities with separate boards, executive committees, and staffs (Tr. 68, 73-74). The National Cattlemen's Beef Association is one of the organizations with which the Cattlemen's Beef Promotion and Research Board has a contractual relationship. The National Cattlemen's Beef Association and the Cattlemen's Beef Promotion

and Research Board have a joint staffing arrangement. Under this joint staffing arrangement, five National Cattlemen's Beef Association employees devote some of their time to Cattlemen's Beef Promotion and Research Board activities and the National Cattlemen's Beef Association bills the Cattlemen's Beef Promotion and Research Board for the time spent by National Cattlemen's Beef Association employees on Cattlemen's Beef Promotion and Research Board activities. (Tr. 83-92, 108-09.) Neither the contractual relationship nor the joint staffing arrangement between the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board support Respondents' contention that the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board are a single entity. Moreover, even if I found that no reasonable separation could be made between the National Cattlemen's Beef Association and the Cattlemen's Beef Promotion and Research Board, that finding would not operate as a defense to Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations and would not constitute a mitigating circumstance to be taken into consideration with respect to the sanction to be imposed for Respondents' violations of the Beef Promotion Order and the Beef Promotion Regulations.

Further, the record does not support Respondents' contention that the National Cattlemen's Beef Association is, in effect, a governmental agency. The United States Supreme Court concluded that the National Railroad Passenger Corporation [hereinafter Amtrak] was an agency of the United States for purposes of individual rights guaranteed by the United States Constitution. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995). The Court based its conclusion that Amtrak is an agency of the federal government on the following findings: (1) Amtrak is established under federal law for the purpose of pursuing federal government objectives under the direction and control of federal government appointees; (2) six of the nine Amtrak board members are appointed by the President; (3) the United States holds all of Amtrak's preferred stock; (4) the United States subsidizes Amtrak's losses; and (5) Amtrak is required to submit annual reports to the President and Congress. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. at 383-400.

I find, based on the factors the United States Supreme Court applied in *Lebron* to determine whether Amtrak is an agency, that the National Cattlemen's Beef Association is not, in effect, a federal agency, as Respondents contend. Unlike Amtrak, which was established under federal law, the National Cattlemen's Beef Association is a national nonprofit, industry-governed organization (Tr. 73, 95-96). The record does not contain any evidence that the National Cattlemen's Beef Association was created by the federal government under federal law or that the purpose of the National Cattlemen's Beef Association is the furtherance of governmental objectives. Moreover, unlike Amtrak, in which six of the nine board members are appointed by the President, there is no evidence in the record that any

member of the board of the National Cattlemen's Beef Association is appointed by any United States government employee or elected official, and unlike Amtrak, in which the United States owns all of the preferred stock, there is no evidence that the United States owns any stock in the National Cattlemen's Beef Association. Further still, unlike Amtrak, there is no evidence in the record that the United States subsidizes the National Cattlemen's Beef Association or that the National Cattlemen's Beef Association is required by law to report to the President or Congress.

Sixth, Respondents contend the ALJ's assessment of a $12,000 civil penalty against Respondents is error (Appeal Pet. at 4-5). Respondents state they violated the Beef Promotion Act and the Beef Promotion Order to protest perceived violations of their right under the First Amendment to the United States Constitution to free speech and perceived violations of the Beef Promotion Act by the United States Department of Agriculture and the National Cattlemen's Beef Association. Moreover, Respondents contend their violations did not damage or potentially damage the Beef Promotion Order and their failure to pay $250 in checkoff assessments does not warrant the $12,000 civil penalty assessed by the ALJ. (Brief in Support of Appeal Pet. at 11-13.)

A sanction by an administrative agency must be warranted in law and justified in fact.[4] The Secretary of Agriculture has authority to assess a civil penalty not

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[4] *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz*

exceeding $5,000 for each violation of the Beef Promotion Order and the Beef Promotion Regulations (7 U.S.C. § 2908(a)). Respondents violated section 1260.172 of the Beef Promotion Order and sections 1260.311 and 1260.312 of the Beef Promotion Regulations (7 C.F.R. §§ 1260.172, .311, .312) by failing to pay assessments for 247 cattle sold on or about October 9, 1997, and by failing to pay assessments for three cattle sold on or about April 4, 1998. Each of the 250 transactions constitutes a separate violation,[5] and Respondents could have been assessed a $1,250,000 civil penalty for their violations of 7 C.F.R. §§ 1260.172, .311, and .312. Moreover, Respondents violated section 1260.175 of the Beef Promotion Order by failing to pay late-payment charges for assessments that Respondents failed to pay when due. Late-payment charges are due each month (7 C.F.R. § 1260.175), and each month that Respondents failed to pay late-payment charges constitutes a separate violation of 7 C.F.R. § 1260.175.[6] Respondents were required to remit assessments on the 247 cattle sold on October 9, 1997, no later than November 15, 1997, and Respondents were required to remit assessments on the three cattle sold on April 4, 1998, no later than May 15, 1998. *See* 7 C.F.R. § 1260.172(a)(5). Late-payment charges are due on the day following the date assessments are due. *See* 7 C.F.R. § 1260.175. I find Respondents committed at least nine violations of section 1260.175 of the Beef Promotion Order (7 C.F.R. § 1260.175) during the period from November 16, 1997, through August 5, 1998, and Respondents could have been assessed a $45,000 civil penalty for their violations of 7 C.F.R. § 1260.175. Therefore, the ALJ's assessment of a $12,000 civil penalty against Respondents for 259 violations of Beef Promotion Order and the Beef Promotion Regulations is warranted in law.

Moreover, the ALJ's assessment of a $12,000 civil penalty is justified by the

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Fruit & Produce Co., 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

[5]See *United States v. Frame*, 885 F.2d 1119, 1124 (3d Cir. 1989) (stating "[t]he Secretary may, after an administrative hearing, issue an order to restrain or prevent a person from violating the Beef Order, and assess a civil penalty of up to $5,000 for *a* violation already committed" (emphasis added)); *Goetz v. United States*, 99 F. Supp.2d 1308, 1320-22 (D. Kan. 2000) (affirming the Judicial Officer's imposition of a civil penalty for each violation of the Beef Promotion Order), *appeal docketed*, No. 00-3173 (10th Cir. June 14, 2000); *Goetz v. Glickman*, 920 F. Supp 1173, 1177 (D. Kan. 1996) (stating "[a]fter an administrative hearing, the Secretary may issue an order restraining violations and may impose a civil penalty of up to $5,000 for *each* violation of the [Beef Promotion] Act and the Order" (emphasis added)), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied,* 525 U.S. 1102 (1999).

[6]See note 5.

facts. Respondents admit they intentionally violated the Beef Promotion Order and the Beef Promotion Regulations (Brief in Support of Appeal Pet. at 12). Respondents were fully aware of the Beef Promotion Order and the Beef Promotion Regulations (Tr. 172-73, 224). The Beef Promotion Act is published in the statutes at large and the United States Code, and Respondents are presumed to know the law.[7] The Beef Promotion Order and the Beef Promotion Regulations are published in the *Federal Register*, thereby constructively notifying Respondents of the Beef Promotion Order and the Beef Promotion Regulations.[8] Moreover, Respondents were repeatedly warned that they were violating the Beef Promotion Order and the Beef Promotion Regulations (CX 4, CX 5, CX 6; Tr. 32-34, 61-63). Notwithstanding Respondents' knowledge of the requirements of the Beef Promotion Order and the Beef Promotion Regulations and the repeated warnings that they were violating the Beef Promotion Order and the Beef Promotion Regulations, Respondents intentionally violated the Beef Promotion Order and the Beef Promotion Regulations at least 259 times and continued to violate the Beef Promotion Order and the Beef Promotion Regulations during the period from November 15, 1997, through August 5, 1998. Under these circumstances, I find Respondents' violations were willful.[9]

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[7] *See Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

[8] *See FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965).

[9] An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent, or done with careless disregard of statutory requirements. *Allred's Produce v. United States Dep't of Agric.*, 178 F.3d 743, 748 (5th Cir.), *cert. denied*, 120 S.Ct. 530 (1999); *Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th

Moreover, Respondents' violations are extremely serious because they undermine the ability to conduct the beef promotion program. If sufficient numbers of persons were to violate the Beef Promotion Order and the Beef Promotion Regulations in the manner in which Respondents violated the Beef Promotion Order and the Beef Promotion Regulations, the assessments remitted to the Cattlemen's Beef Promotion and Research Board and qualified state beef councils would not be sufficient for the operation of the beef promotion program.

I find Complainant proved by a preponderance of the evidence that Respondents committed at least 259 violations of the Beef Promotion Order and the Beef Promotion Regulations.[10] Complainant could have sought a maximum civil penalty of $5,000 for each of Respondents' violations, for a total civil penalty of $1,295,000. Instead, Complainant seeks a civil penalty of $46.332046 for each of Respondents' violations. In light of the number of Respondents' violations, the willful nature of Respondents' violations, and the serious nature of Respondents' violations, I am perplexed by the small amount of the civil penalty recommended by Complainant for each violation. However, Complainant believes that a $12,000

Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960). *See also Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) ("'Wilfully' could refer to either intentional conduct or conduct that was merely careless or negligent."); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) ("In statutes denouncing offenses involving turpitude, 'willfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'")

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word "willfulness," as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Appeal in this proceeding does not lie to the United States Court of Appeals for the Fourth Circuit or to the United States Court of Appeals for the Tenth Circuit. However, even under this more stringent definition, Respondents' violations would still be found willful.

[10]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

civil penalty is sufficiently substantial to deter Respondents and other potential violators from future violations of the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations (Complainant's Findings of Fact, Conclusions of Law and Brief in Support Thereof at 28; Tr. 125-31). The United States Department of Agriculture's sanction policy requires that I give appropriate weight to the sanction recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the statute in question,[11] and despite the facts of this proceeding, which would appear to warrant a significantly higher civil penalty, I am reluctant to assess a civil penalty larger than that recommended by Complainant. Therefore, I assess a civil penalty of $12,000 against Respondents.

Seventh, Respondents contend the ALJ erroneously concluded that Respondents' defense regarding the improper recognition of the National Cattlemen's Beef Association as an established national nonprofit, industry-governed organization was "factually and legally erroneous" (Appeal Pet. at 5).

Respondents' contention that the National Cattlemen's Beef Association is improperly recognized as an established national nonprofit, industry-governed organization as defined in section 1260.113 of the Beef Promotion Order (7 C.F.R. § 1260.113) is not relevant to this proceeding. Even if I found that the National Cattlemen's Beef Association did not meet the definition of an established national nonprofit, industry-governed organization in 7 C.F.R. § 1260.113, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations. Moreover, as discussed in this Decision and Order, *supra*, the record supports a finding that the Agricultural Marketing Service properly recognized the National Cattlemen's Beef Association as an established nonprofit, industry-governed organization, as defined in 7 C.F.R. § 1260.113.

Eighth, Respondents contend the ALJ erroneously concluded Respondents' defense regarding the National Cattlemen's Beef Association's improper influence of governmental policy or action was "factually and legally erroneous" (Appeal Pet. at 5).

Respondents' contention that the National Cattlemen's Beef Association improperly influences governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) is not relevant to this proceeding. Even if I

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[11] *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3).

found that the National Cattlemen's Beef Association improperly influenced governmental policy and action, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations. Moreover, as discussed in this Decision and Order, *supra*, the record does not support a finding that the National Cattlemen's Beef Association used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e). Instead, the record supports a finding that the National Cattlemen's Beef Association has not used funds collected by the Cattlemen's Beef Promotion and Research Board for the purpose of influencing governmental policy or action in violation of 7 U.S.C. § 2904(10) and 7 C.F.R. § 1260.169(e) (Tr. 77-79).

Ninth, Respondents contend the ALJ erroneously concluded Respondents' defense regarding the rejection of Respondents' proposal to utilize checkoff funds for a nutritional speaker was "factually and legally erroneous" (Appeal Pet. at 5).

Respondents' contention that their proposal to utilize checkoff funds for a nutritional speaker was improperly rejected is not relevant to this proceeding. Even if I found that Respondents' proposal to utilize checkoff funds was improperly rejected, that finding would not operate as a defense to Respondents' failures to pay assessments and late-payment charges required by the Beef Promotion Order and the Beef Promotion Regulations.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Beef Promotion Act, the Beef Promotion Order, and the Beef Promotion Regulations and, in particular, shall cease and desist from:

(a) failing to pay all assessments when due; and

(b) failing to pay late-payment charges.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a $12,000 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States. Respondents shall send the certified check or money order to:

Sharlene A. Deskins
United States Department of Agriculture
Office of the General Counsel
Marketing Division

1400 Independence Avenue, SW
Room 2343 - South Building
Washington, DC 20250-1417

Respondents' payment of the civil penalty shall be sent to, and received by, Ms. Deskins within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to BPRA Docket No. 98-0002.

3. Respondents shall pay past-due assessments and late-payment charges of $417.79 which shall be paid by certified check or money order, made payable to the Montana Beef Council. Respondents shall send the certified check or money order to:

Montana Beef Council
420 North California
Post Office Box 5388
Helena, Montana 59604

Respondents' payment of past-due assessments and late-payment charges shall be sent to, and received by, the Montana Beef Council within 60 days after service of this Order on Respondents.

APPENDIX A

Delano Farms Co. v. The California Table Grape Comm'n, CV-F-96-6053 OWW DLB (E.D. Cal. Sept. 11, 1997).

APPENDIX B

Matsui Nursery, Inc. v. The California Cut Flower Comm'n, Civ. No. S-96-102 EJG/GGH (E.D. Cal. Aug. 4, 1997).

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